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Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments—How Can We Benefit from Past Experiences in Conciliating the Two Doctines of Forum Non Conveniens and Lis Pendens

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Declining Jurisdiction in a Future International Convention on Jurisdiction and Judgments—How Can We Benefit from Past Experiences in Conciliating the Two Doctrines of *Forum Non Conveniens* and *Lis Pendens?*

GREGOIRE ANDRIEUX*

We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.

Justice Cardozo[1]

I. INTRODUCTION

Among the reasons for the success of international arbitration is that arbitral awards are subject to a widely agreed-upon regime of recognition and enforcement. One of the most largely ratified conventions, the New York Convention,[2] sets forth a framework for the recognition and enforcement of arbitral awards, making

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1. Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 201 (1918).

2. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

them more attractive than court judgments that lack such a global regime.[3]

Countries have shown an overwhelming reluctance to establish a system which would automatically deprive them of important aspects of their sovereignty: the right to adjudicate pursuant to their jurisdictional rules and to limit the effects on their territory of a foreign judge's decisions, especially when she is from an unknown or unapproved jurisdiction.[4] This fear of the unknown, however, has not barred the conclusion of regional agreements. Where the other contracting states are well-known neighbors, countries have been more willing to conclude agreements whereby foreign judgments could be automatically recognized and enforced within their territory. The systems established in the Brussels[5] and Lugano[6] Conventions and the more recent European Community (EC) Regulation are excellent examples of this practice.[7] This regime is, however, limited to the contracting states and does not solve the problems of enforcing judgments on a global scale.

Despite their reluctance, countries have for a long time entertained the idea of an international regime. The Hague Conference on Private International Law first worked on a treaty touching on an international regime in 1925.[8] A text was achieved,[9] but was only partially successful and was merely viewed as a model for a regional treaty.[10] Later, in 1971, under the auspices of The Hague Conference, the first Convention on the Recognition and

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3. *See* Patrick J. Borchers, *Book Review*, 90 AM. J. INT'L L. 547, 548 (1996) (writing that an American company seeking to enforce liability against a French partner is almost certainly better off with an arbitration award than a court judgment).

4. *See* Martine Stuckelberg, Lis Pendens *and* Forum Non Conveniens *at the Hague Conference: The Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, 26 BROOK. J. INT'L L. 949, 952 (2001).

5. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1972 J.O. (L 299) 32, *amended by* 1990 O.J. (C 189) 1, *reprinted in* 29 I.L.M. 1413 (1990).

6. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1988 O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620 (1989).

7. Council Regulation No. 44/2001 of 22 December 2000 Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Council Regulation No. 44/2001].

8. Actes de la Cinquième session de la Conférence de La Haye de Droit International Privé (1925), 332.

9. *Id.* at 332-44.

10. *See* Adair Dyer, *Synthesis of the Recognition and Enforcement of Judgments under the Hague Conventions and the EEC Convention*, 7(i) INT'L LEGAL PRAC. 23, 23 (1982).

Enforcement of Foreign Judgments in Civil and Commercial Matters was adopted.[11] Only a few countries - Cyprus (1976), The Netherlands (1979), Portugal (1983), and more recently Kuwait (2002) - ratified the Convention.[12] These ratifications were not given any weight because the countries did not comply with the Convention's requirements of supplementary bilateral agreements.

The failure of this Convention, which had resulted in its birth, did not put an end to the idea. Countries have kept in mind that jurisdiction and enforcement of foreign judgments are governed by a web of different regimes, whose combination may lead to a vain struggle for a party seeking justice. A comparison of the laws of three European countries – the United Kingdom, France, and Germany – illustrates the complexity of the current enforcement system and shows the advantages from which parties to a dispute could benefit, should an international system be successfully drafted.[13] Such a system would facilitate enforcement and

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11. *See id.*

12. *See generally* Dyer, *supra* note 10.

13. *See* Allan T. Slagel & Barton J. O'Brien, *United States*, *in* ENFORCEMENT OF FOREIGN JUDGMENTS, 4 (Louis Garb & Julian Lew eds., 2003) (explaining types of enforceable judgments under the Uniform Recognition Act).

In Germany, for instance, judgments granting punitive damages and judgments awarding excessive damages are not enforceable. *See* ENFORCEMENT OF FOREIGN JUDGMENTS (Louis Garb & Julian Lew eds., 2003). This causes an obvious obstacle to the recognition and enforcement of American judgments in Germany.

Enforcement of foreign judgments in the United Kingdom is governed by common law rules and statutory provisions. The application of these laws depends on the country whose courts have rendered the judgment sought to be enforced in the UK. The statutes that govern this question are: (1) the Administration of Justice Act 1920 (AJA), which generally applies to former British colonies and various members of the Commonwealth; (2) the Civil Jurisdiction and Judgments Act 1982 (CJJA), which was taken in application of the Brussels and Lugano Conventions and therefore applies to contracting states; and (3) the Foreign Judgments (Reciprocal Enforcements) Act 1933 (FJREA), which applies to certain Commonwealth and European Nations. The common law rule is that any foreign judgment rendered by a court of competent jurisdiction for a definite sum of money that is final and conclusive on the merits, may be enforced at common law absent fraud or some overriding consideration of English public policy. *See* Jeremy Carver & Christopher Napier, *United Kingdom*, *in* ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 195 (Charles Platto ed., 1989). This general rule, however, is not absolute, and the complexity of the British system only weighs in favor of a uniform system.

In comparison, France has a simpler system of enforcing foreign judgments. Although a certain recognition of foreign judgments is available without any specific procedure (*see* Horatia Muir-Watt, *Remarques sur les Effets en France des Jugements Etrangers Indépendamment de l'Exequatur*, *in* MELANGES DEDIES A DOMINIQUE HOLLEAUX, 301 (*Litec*, 1990)), most cases require a specific procedure (the "exequatur") for enforcement purposes. But this simplicity does not mean that all foreign judgments are enforceable in France. Judgments for specific performance, for instance, are

recognition, lower their cost, and increase predictability. Therefore, it would be undeniably profitable and would reduce international tensions caused by certain national provisions such as the German rejection of punitive damages, the British refusal to enforce default judgments, or the French reluctance to enforce specific performance.[14]

In addition, the success of the Brussels and Lugano Conventions on a regional scale showed that a workable system could be achieved. These conventions even further enhanced the need for a global convention by aggravating the gap between the treatment of judgments rendered by courts of Brussels Convention's non-contracting states and the treatment of judgments issued by member states' courts. The American situation is an example of this gap, as no bilateral or multilateral conventions are in force between the United States and any other country on reciprocal recognition and enforcement of judgments. While American laws[15] result in globally favorable treatment of foreign judgments by U.S. courts,[16] a 1988 survey concluded that the treatment of U.S. judgments abroad was "far from satisfactory."[17] This helped demonstrate that countries who are part of the enforcement and recognition regime created by the Brussels Convention do not welcome American judgments with the same enthusiasm.

This situation triggered the 1992 American proposal that the

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enforceable only when the remedy would be granted under French law, which means very seldom and only when money damages are not adequate.

14. *See* ENFORCEMENT OF FOREIGN JUDGMENTS (Louis Garb & Julian Lew eds. 2003).

15. In the United States, the Full Faith and Credit Clause of the Constitution only applies to sister states' judgments and does not extend to foreign judgments. U.S. CONST. art. IV, §1. Nevertheless, under the UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1962), adopted by a majority of states, U.S. courts recognize and enforce foreign money judgments in a manner similar to the Full Faith and Credit Clause. The U.S. court will treat the foreign judgment as creating a debt whose creditor is the foreign plaintiff seeking enforcement. The Uniform Act provides that, subject to certain exceptions, final, conclusive, and enforceable foreign money judgments are conclusive in the United States. *See* Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L. L. 167, 173-74 (1998).

16. Virtually every foreign judgment (money judgments, judgments for specific performance, injunctions, personal status judgments, and punitive damages) is enforceable in the United States. *See* Slagel & O'Brien, *supra* note 13, at United States – 4.

17. Fredrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters,* 36 AM. J. COMP. L. 1, 4 (1988).

Hague Conference on Private International Law undertake the negotiation of a multilateral convention on recognition and enforcement of foreign judgments. This proposal was supported[18] and the decision to establish a Special Commission Session to study the matter was further undertaken a year later in May 1993.[19] Participants decided to work on a mixed convention which included both provisions on recognition and enforcement of judgments, as well as provisions on jurisdiction.[20]

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18. *See* Paul R. Beaumont, *A United Kingdom Perspective on the Proposed Hague Judgments Convention,* 24 BROOK. J. INT'L L. 75 (1998) (describing the British support given to the U.S. proposal).

19. *See* Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments,* 37 TEX. INT'L L.J. 467, 490 (2002).

20. The problem of exorbitant jurisdiction is one reason why participants decided to negotiate on both jurisdictional rules and enforcement provisions. Courts are sometimes faced with procedures seeking enforcement of foreign judgments obtained under certain jurisdictional rules that they consider totally unreasonable. Similarly, by virtue of these rules, individuals are placed in uncertain positions to the extent to which they are amenable to process in foreign courts.

The same approach was taken in the Brussels and Lugano Conventions, which excluded the application of such provisions from the relations between contracting states. Different examples may be found among the legal systems of countries previously examined in this Article:

(1) Jurisdiction based upon the presence of assets in the state. This system was chosen under the German ZPO § 23, which gave jurisdiction to German courts over any defendant who owned assets in Germany. *See* § 23 ZIVILPROZESSORDNUNG [ZPO] (F.R.G.), *available at* http://www.rechtsrat.ws/gesetze/zpo/0001.htm. Considering the great risk of abuse of such a process (for companies which owned assets in Germany and even for tourists who may at their greatest misfortune forget a personal asset in the country), in 1998 the German BGH modified its construction of ZPO § 23 and stated that the provision should be interpreted as including an additional requirement of reasonable connection between the forum and the dispute.

(2) Jurisdiction based upon nationality. Typically such a system uses the plaintiff's only connection with the forum to establish jurisdiction over the dispute. The danger of this provision resides in the fact that virtually anyone in the world is amenable to process in a French court.

(3) The American and English "tag jurisdiction" rule. The U.S. Supreme Court approved the validity of asserting jurisdiction based on service of process. Burnham v. Super. Ct. of California, County of Marin, 495 U.S. 604, 628 (1990). The transient rule is also governing in England. Maharanee of Baroda v. Wildenstein [1972] 2 Q.B. 283 (Eng. C.A.), except as provided by article 3(2) of the EC Regulation. Although the application of "tag jurisdiction" by both English and American courts does not seem to be abusive, the danger of abuse of this type of basis for jurisdiction is obvious and is seen as exorbitant by civil law countries.

(4) The "Doing business" rule. American law also applies a standard that appears exorbitant to other countries: continuous and systematic business contacts with the forum. Int'l Shoe v. Washington, 326 U.S. 310 (1945). Most

Drafting a global regime, in which application will be left to national courts of different legal traditions, requires innovative proposals in order to reconcile possibly conflicting theories of those legal traditions. A number of conflicts between theories of common law and civil law systems arise from the notion of judicial discretion. Under the traditional definition of judicial discretion, "applicable rules confine permissible legal choices within a range of alternatives, but do not determine 'correct' legal outcomes. A judge remains free to choose among limited alternatives."[21]

Judicial discretion is defended in common law systems for its propensity to reach fair outcomes but feared in civil law countries for the unpredictability it generates. In fact, "[i]f a decision is truly discretionary, the legal determinates of the outcome are balanced and variability in outcome is predictable."[22] Therefore, this notion is the cornerstone of numerous conflicts between common law and civil law systems. Among these is the opposition between the common law doctrine of forum non conveniens and the civil law doctrine of lis pendens.

The doctrine of forum non conveniens allows a court having jurisdiction to stay or dismiss the proceedings where it finds that a more appropriate alternative forum exists.[23] This doctrine is primarily concerned with a fair administration of justice through the search for the most appropriate forum. On the contrary, civil law countries emphasize the need for predictability, and give their judges discretion to stay the proceedings in situations where the same case is pending in two different courts. This mechanism however, referred to as lis pendens[24], may lead to unfair outcomes.

Working together on the project of The Hague Convention on Jurisdiction and Judgments, civil law countries and common law countries needed to find a compromise between their apparently conflicting theories on the question of declining

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European States see this basis for general jurisdiction as useless and unreasonable.

21. *See* Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 62 (1984).

22. Maureen Armour, *Rethinking Judicial Discretion: Sanctions and the Conundrum of the Close Case*, 50 SMU L. REV. 493, 496 (1996).

23. *See* J. James Fawcett, *General Report*, *in* J. JAMES FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 10 (1995) (discussing the common law doctrine of *forum non conveniens*).

24. *See generally* Hélène Gaudemet-Tallon, *Les Regimes Relatifs au Refus d'Exercer la Compétence Juridictionnelle en Matière Civile et Commerciale: Forum Non Conveniens, Lis Pendens*, 46 REVUE INTERNATIONALE DE DROIT COMPARÉ 423 (1994).

jurisdiction.

Certain difficulties have caused Hague negotiations to slow down and the focus to be placed on negotiating a narrower instrument on exclusive choice of court agreements. These problems though, will not end the idea of, or the need for, a global regime on jurisdiction and judgments. New proposals are expected in the future and it is crucial, in this context and in order to assure that future projects will be successfully adopted within reasonable timeframes, to anticipate the drafting of key provisions such as the provisions on declining jurisdiction. This concern is the underlying raison d'être of this Article, which aims at answering the following questions: Was the compromise reached at the Hague between forum non conveniens and lis pendens acceptable? How does it compare with an ideal – if any – system? Should it be transposed in extenso into future projects?

To answer these questions, Parts II and III of this Article will present the two doctrines of lis pendens and forum non conveniens, their historical and ideological anchorage, and their present application. Both doctrines will be addressed successively. Understanding this background is necessary to apprehend and answer Part IV of this Article, which asks whether these two doctrines should be accounted for in an international system. Part V will attempt to draft a clause for future projects combining the two doctrines and provide a correlative analysis of the compromise reached in the Hague Interim Text on jurisdiction and judgments. Part VI will conclude that even if the Hague Project does not result in a workable or even generally acceptable convention, the admirable work already done on this question in the context of the Hague negotiations should be kept in mind as a valuable basis for future projects when dealing with the question of declining jurisdiction.

II. LIMITED JUDICIAL DISCRETION AND THE CIVIL LAW DOCTRINE OF *LIS PENDENS*

The civil law tradition is characterized by the limited discretion that judges enjoy in their position. Certain provisions of two civil law countries, Germany and France, illustrate this characterization. These two countries, however, have come to recognize the necessity of avoiding parallel litigation and have thus enabled their courts to decline jurisdiction in strictly-defined circumstances.

A. The Limited Discretion Awarded to French and German Courts

Civil law systems are founded on a set of provisions granting little or no discretion to their courts. The civil law's syllogistic reasoning, under which the facts of a case are characterized to fit into a particular provision, leaves little room for factual consideration.[25] Once this reasoning has led to the conclusion that the court has jurisdiction, that court must then assume the jurisdiction. The presumption is that the Civil Code has already judged, thus leaving judges with a purely interpretive authority.

In France, for instance, this can be explained by the historical distrust of the judiciary, illustrated in the famous saying, "Dieu nous garde de l'équité des Parlements."[26] This distrust resulted in the French Revolution's rigid separation of powers as inspired by Montesquieu's dictates.[27] These dictates were followed in all modern democracies but were nevertheless applied differently. In the American legal system, which is also based on this balance of powers, the judiciary benefits from a theoretically large discretion. On the other hand, the French legal system, like most civil law systems, is based on the assumption that the lawmaking authority rests in the hands of the legislature and the judge is nothing but its instrument.[28] Accordingly, once the law has given jurisdiction to a court, it cannot decline jurisdiction for reasons of inconvenience or inappropriateness. This deeply rooted characteristic of the French system explains why the doctrine of forum non conveniens was not received in France. A judge refusing to adjudicate would violate

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25. *See* James P. George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws,* 37 TEX. INT'L L.J. 499, 508 (2002).

26. "May God preserve us from the fairness of the parliaments." Gaudemet-Tallon, *supra* note 24, at 424.

27. CHARLES LOUIS DE SECONDAT MONTESQUIEU, THE SPIRIT OF LAWS (David Wallace Carrithers ed., University of California Press 1977) (1748) (explaining that every man invested with power is apt to abuse it. Therefore, he based his theory of the separation of powers on an assertion that only power can restrain power.).

28. It has been argued that on the contrary, it is really the judge who controls. The instrumental functions assumed by judges put them under no pressure to justify their decisions. The French decisions of the *Cour de Cassation* are characterized by their shortness and lack of motivation. Therefore, what was originally conceived as restraining the judicial power has in fact increased it. For a discussion on this matter, *see* Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System,* 104 YALE L.J. 1325, 1332 (1995). Similarly, the actual discretion of American judges in their adjudicating authority may be debated with regards to the limits placed on judicial authority by the statutes' restrictive wording.

the law by committing a denial of justice.[29]

The German legal system is based on the same assumption. German civil procedure rules are embodied in the Code of Civil Procedure (the ZPO[30]), setting rules which do not provide for judicial discretion.[31] Once the rules point towards the German judge as having jurisdiction to hear a case, she is bound to assume it.[32]

The rejection of forum non conveniens by German law, however, is not absolute.[33] In fact, a similar reasoning as the one applied in the common law doctrine is found in some strictly defined areas of international non-contentious proceedings. For instance, section 47(I) of the German Code of Non-Contentious Proceedings (the FGG[34]) allows a court to decide not to appoint a guardian for an incompetent if the interests of the ward are better served in an alternative forum.[35] The court is hereby given discretion in determining the best interest of the ward. Likewise, section 47(II) gives the court discretion to transfer its control over guardianships to an alternative forum more favorable to the ward's best interests.[36]

This mechanism closely resembles the doctrine of forum non conveniens.[37] However, the official position remains that German law takes no cognizance of forum non conveniens.[38] The circumstances under which German courts are given a certain

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29. Article 4 of the Code Civil states that judges may not refuse to judge. One who would do so would be guilty of denial of justice.

30. *See generally* ZIVILPROZESSORDNUNG [ZPO] [Code of Civil Procedure] (F.R.G.).

31. *See* Markus Lenenbach, *Antisuit Injunctions in England, Germany and the United States: Their Treatment Under European Civil Procedure and the Hague Convention,* 20 LOY. L.A. INT'L & COMP. L. REV. 257, 276 (1998).

32. *See id.* at 277; § 36, ZPO.

33. *See* Dr. Haimo Schack, *Germany, in* J. JAMES FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 191 (1995).

34. GESETZ ÜBER DIE ANGELEGENHEITEN DER FREIWILLIGEN GERICHTSBARKEIT [FGG] [Code of Non-Contentious Proceedings] (F.R.G.).

35. *See generally* Alexander Reus, *Judicial Discretion: A Comparative View of the Doctrine of Forum Non Conveniens in the United States, the United Kingdom, and Germany,* 16 LOY. L.A. INT'L & COMP. L. REV. 455, 493 (1994); § 47(1) FGG, *available at* http://dejure.org/gesetze/FGG/47.html.

36. *See* Reus, *supra* note 35, at 493.

37. For another example of a delimited area where German courts can exercise some discretion, *see id.* at 492-93. The author explains that the ZPO enables the court, sitting in proceedings for the appointment of a guardian for an incompetent, to disregard its statutory jurisdiction and transfer the proceedings to another court in the best interest of the ward.

38. Zoller/Bearbeiter, ZPO, 22. Aufl., § 328 Rn 119b.

degree of discretion are narrowly defined and can not be expanded without breaking the system.[39] The German jurisdictional rules are commanded by Article 101(1) of the German Constitution (GG)[40] which seeks to assure a predictable determination of jurisdiction by providing that "[n]o one may be removed from the jurisdiction of his lawful judge."[41]

Despite those apparently strict provisions of French and German law, both systems have recognized the need to avoid parallel litigation and have therefore adopted provisions allowing judges to decline jurisdiction in limited circumstances.

B. Avoiding Parallel Litigation: The German and French Lis Pendens Rules

Both Germany and France recognize the need to avoid parallel litigation that contributes to the congestion of courts, increases litigation costs, and may lead to conflicting outcomes, thus, leaving the parties in the same position as before the intervention of the courts.[42]

1. The German *Lis Pendens*

Although German law rejects the doctrine of forum non conveniens, it recognizes the doctrine of lis pendens whereby a court may decide to decline jurisdiction. Article 261, III of the ZPO provides that the judge shall dismiss a second action dealing with (1) the same parties and (2) the same cause of action.[43] But this provision cannot be presented as an exception to the fact that German courts are left with no discretion. For example, should the requirements for a lis pendens dismissal be fulfilled, the German judge has no choice but to dismiss the action.[44] This lis pendens rule has also been applied by German courts in international jurisdiction issues,[45] but its application varies depending on which country issued the judgment whose enforcement is sought in

39. *See* Schack, *supra* note 33, at 194 (citing *Kropholler*, *in* HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENRECHTS, para. 208, (Tübingen 1982)).

40. GRUNDGESETZ [GG] [Constitution] (F.R.G.).

41. "Niemand darf seinem gesetzlichen Richter entzogen werden." GG art. 101(1).

42. For a more detailed discussion of the problems of parallel litigation, *see infra* part III.

43. § 261, III ZPO, *available at* http://www.rechtsrat.ws/gesetze/zpo/0253.htm#261.

44. § 36, ZPO.

45. *See* Schack, *supra* note 33, at 196 (*citing* BGH, 16 June 1982 [1982] FamRZ 917; BGH, 10 Oct. 1985 [1986] NJW 2195).

Germany.

When dealing with foreign judgments, German judges have traditionally applied lis pendens and dismissed the case where the same action between the same parties was pending in a foreign forum prior to its filing in Germany, provided that the foreign judgment would be enforceable in Germany.[46] The latter condition, however, is not required by the regime set forth in Article 27 of the EC Council Regulation.[47] Therefore, where the other forum is another Member State of the Brussels Convention, German courts must apply the lis pendens theory regardless of whether or not the judgment will then qualify for recognition in Germany.

On the contrary, where the other forum is not a contracting State of the Brussels Convention, German courts still apply the condition of subsequent enforceability in Germany, but now tend to modify the consequences of a lis pendens finding. The usual consequence of lis pendens in German law is the dismissal of the action. The enforceability condition, however, requires the judge to consider elements that she may not control, such as the issue of limitations. To avoid the risk that these jurisdictional games result in depriving the parties of their day in court, German courts have tended to suspend the proceedings rather than dismiss them.[48] Thus, this is the only discretion they are left with; German courts can suspend or dismiss the proceedings, but they cannot carry on with the case.

2. The French "Exception de Litispendance"

Article 100 of the French New Code of Civil Procedure (NCPC)[49] is a lis pendens provision, which is conceived as an anticipated application of res judicata.[50] The French code states that lis pendens arises when the same dispute is pending before two competent jurisdictions of the same degree.[51] Where the French NCPC only requires an element of "same dispute," the

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46. *See* MICHEL FROMONT & ALFRED RIEG, INTRODUCTION AU DROIT ALLEMAND, REQPUBLIQUE FEDERALE 627 (Editions Cujas 1991).

47. Article 27 of the EC Council Regulation replaces Article 21 of the Convention as amended by Article 8 of the Accession Convention.

48. *See* Schack, *supra* note 33, at 196 (citing OLG Karlsruhe, 15 Dec. 1969 [1970] FamRZ 410, 412; Geimer, *Internationales Zivilprozessrecht* (Cologne 1987), para. 2181).

49. Nouveau Code de procédure civile.

50. BERNARD AUDIT, DROIT INTERNATIONALE PRIVÉ 337 (3d. ed. 2000).

51. *See id.*

German ZPO sets forth a twofold test of same parties and same cause of action. Nevertheless, the French condition of "same dispute" has been understood as implying a condition of identity of the parties, identity of the object of the dispute, and identity of the cause of action.[52] The French provision is therefore simply not as self-explanatory as the German provision.

Theoretical discussions have taken place as to the necessity and appropriateness of the last element.[53] Indeed, the cause of action is constituted by the facts and legal rules that are brought into the debate. In practice, identity of the cause of action can not be considered and evaluated by the judge until all factual and legal elements have been disclosed, that is to say, until the end of the hearing, and consequently until after an exception of lis pendens can be invoked. In other words, the lis pendens exception cannot be examined by the judge until a stage of the hearing at which it is normally not possible for a party to invoke it.

Interesting though it appears from a theoretical perspective, it seems that few practical consequences are to be attached to this argument. The lis pendens exception can be brought by one of the parties,[54] but will only be granted if invoked before the second forum seized, unless the court first seized is one of a lower degree.[55] Should the parties not invoke lis pendens, the last court seized can decide on its own to decline jurisdiction.[56]

This system of "litispendance" experienced a long-standing acceptance in French domestic law but did not make its way into private international law until relatively recently. On several occasions the French Supreme Court ("Cour de Cassation") expressed its unwillingness to admit that lis pendens could apply in private international law.[57] The last strong rejection of the doctrine was expressed in 1969 when the court reaffirmed that as a principle the exception of "litispendance" was not admissible in France where the case was pending before a foreign court.[58] This decision

52. *See* Dalloz Action, PROCÉDURE CIVILE (2000), para. 960.

53. *See* Daniel Ammar, *De la Litispendance et de la Connexité en Droit International Privé, ou Rester Aveugle et Lier les Mains du Juge,* 9 RECUEIL DALLOZ 211, 213 (2000).

54. *See id.*

55. *See id.*

56. *See id.*

57. *See* PIERRE MAYER & VINCENT HEUZÉ, DROIT INTERNATIONAL PRIVÉ 293 (Montchrestien 7th ed., 2001).

58. "[I]l est de principe que l'exception de litispendance n'est pas reçue en France à raison d'une instance introduite à l'étranger." *Id.*

was the last breath of a dying opposition. In fact, the disaster caused by the French solution at the level of international cooperation resulted in a slow evolution which started in the early 1960s.[59]

In 1962, the French Cour de Cassation in Zins[60] opted for a solution that was more favorable to the recognition of lis pendens in private international law. This orientation was then given credit by later cases.[61] The 1969 rejection of this change in the law was widely criticized and advocates of the recognition of the doctrine in private international law eventually succeeded.[62] This success came in the 1974 Miniera di Fragne[63] case in which the court admitted international lis pendens. The court noted, however, that the plea was admitted only if the decision rendered abroad could be recognized in France. The French practice of international lis pendens is in this sense similar to the German one: the judge must evaluate a subsequent recognition in France of the foreign judgment and cannot consider whether or not the French court is an appropriate forum.[64]

Although French courts must abide by the law and decline jurisdiction when the conditions of lis pendens under domestic law are fulfilled, they have, in international matters, certain discretion as to whether or not to stay the proceedings.[65] They have the power to refuse to decline jurisdiction even though the conditions of lis pendens are met.[66] Academics support the absence of a

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59. *See* YVON LOUSSOUARN & PIERRE BOUREL, DROIT INTERNATIONAL PRIVÉ 549 (Dalloz 6th ed., 1999).

60. Cass. 1e. civ., May 5, 1962, D. Jur. 1962, 718.

61. Civ. I 9 déc. 1964, [1966] Rev. crit. dr. int. pr. 72; Paris 3 juin 1966, [1967] *Rev. crit. dr. int. pr.* 734; Cass. 1e. civ., Dec. 9, 1964, 734.

62. *See, e.g.,* Dominique Holleaux, *La Litispendance Internationale*, TRAVAUX DE COMITÉ FRANCAIS DE DROIT INTERNATIONAL PRIVÉ 203, 203 (1971-73) (encouraging an abandonment of the Cour de Cassation's repeated rejection of *lis pendens* in international matters).

63. Cass. 1e. civ., Nov. 26, 1974, *Rev. crit. dr. int. pr.* 1975; *see also* Holleaux, *in* BERTRAND ANCEL & YVES LEQUETTE, LES GRANDS ARRÊTS DE LA JURISPRUDENCE FRANÇAISE DE DROIT INTERNATIONAL PRIVÉ 520 (4th ed. 2001).

64. *See* Gaudemet-Tallon, *supra* note 24, at 423-27.

65. *See* Hélène Gaudemet-Tallon, *France*, *in* J. JAMES FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 181 (1995). This remark, however, excludes cases governed by the EC Regulation, which does not give this power to the courts.

66. *See id.*; *see also* Hélène Gaudemet-Tallon, *La Litispendance Internationale dans la Jurisprudence Française*, *in* MÉLANGES DÉDIÉS À DOMINIQUE HOLLEAUX 121 (Libraire de la Cour de Cassation 1990).

mandatory denial of jurisdiction[67] and encourage the extension of the EC Regulation solution, namely that the consequence of lis pendens be suspension of the action and not dismissal.[68]

III. BROAD JUDICIAL DISCRETION IN DECLINING JURISDICTION: THE LONG-TIME PRACTICE OF *FORUM NON CONVENIENS* IN COMMON LAW

It is generally accepted that the doctrine of forum non conveniens was born in Scotland in the seventeenth century. The practice then spread to other common law countries such as the United States and England. While the modern doctrines of forum non conveniens all derived from the same source, the doctrine has not been uniformly applied between the United States and England.

A. The Scottish Genesis

The exact origin of forum non conveniens remains obscure. Some have said that it was originally borrowed from continental practice.[69] It is, however, commonly agreed that the doctrine's genesis is to be found in Scottish cases of the seventeenth century dealing with the notion of forum non competens.[70] A decision of the Texas Supreme Court, tracing the history of the forum non conveniens doctrine, stated that "[t]he Scottish courts recognized that the plea of forum non competens applied when to hear the case was not expedient for the administration of justice."[71] Therefore, the idea behind this concept of forum non competens was clearly the same rationale as the one that subsequently resulted in the development of the concept of forum non conveniens. The nineteenth-century Scottish case of Longworth v. Hope makes this clear by stating that:

"[The plea of forum non competens] does not mean that the

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67. *See* LOUSSOUARN & BOUREL, *supra* note 59, at 549.

68. *See* AUDIT, *supra* note 50, at 339.

69. *See* Joseph Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867, 881 (1935) (noting that although the use of *forum non conveniens* was probably borrowed from continental practice, the doctrine does not appear to be directly traceable to Roman or continental law).

70. *See* Vernor v. Elvies, 1610 Sess. Cas. (2nd Div.) (Scot.), *reprinted in* Decisions of the Court of Session No. 5 (William Maxwell Morison ed., 1803); *see also* Col. Brog's Heir v. -----, 1639 Sess. Cas. (2nd Div.) (Scot.), *reprinted in* Decisions of the Court of Session No. 28 (William Maxwell Morison ed., 1803).

71. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 676 (Tex. Sup. Ct. 1990).

> forum is one in which it is wholly incompetent to deal with the question. The plea has received a wider signification, and is frequently stated in reference to cases in which the Court may consider it more proper for the ends of justice that the parties should seek their remedy in another forum."[72]

The use of the term forum non competens for cases where jurisdiction could not be contested was a source of confusion. The use of the term did not clearly distinguish between dismissals based on lack of jurisdiction (forum non competens) and dismissals based on the discretion of the court in spite of a finding of jurisdiction (forum non conveniens). Consequently, the term "forum non conveniens" was invented in Scottish legal discourse at the end of the nineteenth century to solve this difficulty.[73]

Despite this Scottish genesis, and the deep influence of civil law on the Scottish legal system,[74] the doctrine of forum non conveniens was rejected by civil law countries and has only been echoed in common law systems.[75]

B. The U.S. Experience

The United States witnessed an independent development of *forum non conveniens*. Indeed, without using the Latin locution, early American courts recognized that in certain cases they had the discretion to refuse jurisdiction.[76] Thus, in *Great Western Railway Co. v. Miller*, the court held as follows:

> "We think that when by the pleadings, or upon the trial, it appears that our tribunals are resorted to for the purpose of adjudicating upon mere personal torts committed abroad, between persons who are all residents where the tort was

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72. Longworth v. Hope, 3 Sess. Cas. M. 1049, 1053 (Scot. 1865).

73. *See* Brand, *supra* note 19, at 469 n. 7, 8.

74. For a discussion about the mixed characteristics of the Scottish legal system, *see* Robin Evans-Jones, *Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law*, 114 L.Q.R. 228 (1998). The author explains that the unsuccessful law teaching in early Scottish universities led lawyers to go to continental Europe in order to complete their education. Thus, through a process of 'reception', Roman law replaced indigenous law as the law of the land. *Id.* at 230. However, the cultural shift in Scotland towards England at the beginning of the nineteenth century explains why English common law started becoming attractive. This resulted in the mixed legal system known in Scotland. *Id.* at 232.

75. Henry H. Perritt, Jr., *Providing Judicial Review for Decisions by Political Trustees*, 15 DUKE J. COMP. & INT'L L. 1, 32 (2004).

76. *See* Edward L. Barrett, Jr., *The Doctrine of* Forum Non Conveniens, 35 CAL. L. REV. 380, 387 (1947).

> committed, the inconveniences and the danger of injustice attending the investigation of such controversies render it proper to decline proceeding further."[77]

The phrase *forum non conveniens* was not expressly used, but the rationale was already present. In the 1817 case of *Gardner v. Thomas*, while Justice Yates recognized that the court had jurisdiction to hear a case in which both parties were foreigners, he had previously stated that he was "inclined to think it must, on principles of policy, often rest in the sound discretion ofthe court to afford jurisdiction or not, according to the circumstances of the case."[78]

The phrase *forum non conveniens* was not commonly used in American law until Wall Street lawyer Paxton Blair dedicated an entire article to the doctrine in 1929.[79] Blair noted that only a few American cases used the Latin phrase. [80] However, this did not restrain him from asserting that American courts were familiar with the practice. Blair learnedly illustrated his assertion by writing that:

> "[u]pon an examination of the American decisions illustrative of the doctrine of forum non conveniens, it becomes apparent that the courts of this country have been for years applying the doctrine with such little consciousness of what they were doing as to remind one of Molière's M. Jourdain, who found he had been speaking prose all his life without knowing it."[81]

The expansion of the doctrine that followed Blair's article was so great that in 1941, Justice Frankfurter's dissent in *Baltimore & Ohio Railway Co. v. Kepner* described the doctrine as a manifestation of "a civilized judicial system. . .firmly imbedded in our law."[82] The year 1948 witnessed the first official recognition of the common law doctrine by federal courts in *Gulf Oil Corp. v. Gilbert.*[83] Although *Gilbert* was a domestic *forum non conveniens* case, it became a basis for granting dismissals in both domestic and

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77. Great W. Ry. Co. v. Miller, 19 Mich. 305, 315-16 (1869).
78. Gardner v. Thomas, 14 Johns. 134, 138 (N.Y. 1817).
79. *See generally* Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 COLUM. L. REV. 1 (1929).
80. *Id.* at 2.
81. *Id.* at 21-22.
82. Balt. & Ohio R. R. Co. V. Kepner, 314 U.S. 44, 55-56 (1941).
83. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

transnational cases.[84] The court was dealing with an action brought in the federal district court of New York by the owner of a public warehouse in Virginia.[85] The plaintiff sought to recover damages for the destruction of his property by fire caused by the defendant's negligence.[86] The defendant relied on *forum non conveniens*, arguing that Virginia was the appropriate place for trial.[87] Over Justice Black's dissent, the majority upheld the district court's dismissal of the action on grounds of *forum non conveniens*.[88] But according to Justice Black, recognizing the doctrine amounted to frustrating the legislative purpose.[89] He wrote, "[t]o engraft the doctrine of *forum non conveniens* upon the statutes fixing jurisdiction and proper venue in the district courts in such actions, seems to me to be far more than the mere filling in of the interstices of those statutes."[90] The majority's opinion was that the existence of proper jurisdiction merely permits the court to decide the case and fails to give the plaintiff a privilege to sue in the forum.[91]

The Court created a two-prong test to determine when a case should be dismissed on grounds of *forum non conveniens*. The first prong is that the Court must determine the existence of an alternative forum.[92] In the Court's own words, "it presupposes at least two forums in which the defendant is amenable to process."[93] The second prong involves a balancing of private and public interest factors.[94] Examples of private interest factors include:

> "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy,

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84. *See* David W. Robertson, Forum Non Conveniens *in America and England: "A Rather Fantastic Fiction"*, 103 L.Q.R. 398, 400 (1987).

85. *Gulf Oil Corp.*, 330 U.S. at 502.

86. *Id.* at 502-03.

87. *Id.* at 503.

88. *Id.* at 512.

89. *See id.* at 515, 517 (Black, J., dissenting).

90. *Id.* at 515 (Black, J., dissenting).

91. *See Gulf Oil Corp.*, 330 U.S. at 506.

92. *See* Peter J. Carney, *International* Forum Non Conveniens*: "Section 1404.5"— A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 426 (1995).

93. *Gulf Oil Corp.*, 330 U.S. at 507.

94. *See id.* at 508.

> expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained."[95]

Public interest factors include administrative ease, reasonableness of the burden on a jury with no relation to the litigation, propriety of trying a diversity case in a forum that is accustomed to applying the relevant state law, and the local interest in having local disputes decided at home.[96]

These public and private interest factors were not intended to be exhaustive.[97] The *Gulf* Court merely sought to establish an illustrative list rather than a catalogue of circumstances requiring dismissal. It left a great degree of discretion for the courts in examining *forum non conveniens* cases. This balancing test is also accompanied by a presumption in favor of the plaintiff.[98] Indeed, the court stated that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[99]

In *Gulf*, the New York District Court had jurisdiction because service of process was made upon a company's agent in New York.[100] Nevertheless, the Supreme Court found that the balancing of public and private interest factors weighed in favor of granting the dismissal on the basis of *forum non conveniens*.[101] The Court found that neither the parties nor any witnesses lived in New York. Additionally, none of the events connected with the action took place in that state.[102]

The federal *forum non conveniens* doctrine was further developed with the enactment of section 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[103] The enactment of this section was a response to the Supreme Court's *Gulf* decision and expressed a congressional intent to make transfers more common and lower the burden on defendants.[104]

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95. *Id.*
96. *See* Carney, *supra* note 92, at 426-27.
97. *See id.* at 427.
98. *See id.*
99. *Gulf Oil Corp.*, 330 U.S. at 508.
100. *Id.* at 503.
101. *See id.* at 512.
102. *Id.* at 509.
103. 28 U.S.C. § 1404(a) (2000).
104. *See* Carney, *supra* note 92, at 428.

There are several differences between *forum non conveniens* and section 1404(a). Unlike a motion for dismissal on grounds of *forum non conveniens,* which may only be invoked by the defendant, a section 1404(a) motion can be brought by either plaintiff or defendant.[105] Another difference is found in the consequences of the motion. Whereas a finding of *forum non conveniens* results in the dismissal of the case, a granting of a section 1404(a) motion only transfers the case to another district court.[106] Such transfers, however, may only be granted where the alternative forum is another district court.[107] Therefore, its use has no impact in international matters where the alternative forum is a foreign court.

The leading case for the application of *forum non conveniens* in international litigation is *Piper Aircraft Co. v. Reyno.*[108] The pilot and five passengers of a small aircraft died when it crashed in Scotland.[109] All the decedents were Scottish residents, but the suit was brought in the United States by the administratrix of the estates for the admitted purpose of taking advantage of more favorable laws regarding liability and damages.[110] The district court granted the defendants' motion for dismissal on grounds of *forum non conveniens.*[111] It applied a "most suitable forum" test and concluded that both public and private interest factors favored Scotland as the appropriate forum despite the unfavorable Scottish law.[112] The court of appeals reversed the decision, holding that dismissal should not be granted where the law of the alternative forum is less favorable to the plaintiff.[113] The Supreme Court affirmed the district court's decision and held that "plaintiffs may [not] defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum."[114] The Court noted that a contrary solution would congest the courts by making them even more

105. *See id.* at 429.
106. *See id.*
107. *See id.* at 428.
108. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).
109. *Id.* at 239.
110. *Id.* at 239-40.
111. *Id.* at 241.
112. *Id.* at 242-44.
113. *Id.* at 244.
114. *Piper Aircraft*, 454 U.S. at 247.

attractive to foreign plaintiffs.[115] The Court held, however, that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight."[116] In this case, the Court found that the remedies provided by the Scottish forum were not inadequate.[117] Scottish law did not provide for strict liability, but this did not amount to depriving the plaintiffs of any remedy.[118]

Gulf and *Piper* constitute the last major developments of the doctrine of *forum non conveniens* in the United States. Both cases fashioned a doctrine which makes the question of declining jurisdiction "the product of some intangible balance of innumerable factors." [119]

C. The British Application of the Doctrine

The Scottish doctrine was first exported to the United States, but also made its way into English law during the twentieth century.[120] This evolution required a strong change in policy. Lord Mansfield in *Mostyn v. Fabrigas* expressed the earlier British position regarding the availability of English courts to foreign plaintiffs[121] by writing that "it is impossible there ever could exist a doubt, but that a [foreign] subject. . . has as good a right to appeal to the King's Courts of Justice, as one who is born within the sound of Bow Bell."[122] One possible explanation for this assertion is that English courts did not have the court congestion problems that led American courts to develop corrective devices allowing for jurisdictional decline.[123] Another reason arises from the judicial "chauvinism" of English courts. This is illustrated by Lord Denning's comment in *The Atlantic Star* case that "if the forum is England, it is a good place to shop in, both for the quality of the

115. *Id.* at 252.
116. *Id.* at 254.
117. *Id.* at 254-55.
118. *Id.* at 255.
119. Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 841 (1985).
120. *See* Brand, *supra* note 19, at 470.
121. The foreign plaintiffs in this case were residents of the Island of Minorca. *Id.*
122. Mostyn v. Fabrigas, 98 Eng. Rep. 1021, 1027 (K.B. 1775).
123. *See* Robertson, *supra* note 84, at 409.

goods and the speed of service."[124]

It was clear for a long time that a litigant bringing an action before an English court would not be easily deprived of this opportunity. Lord Justice Scott asserted this position in a statement which embodied English Law until 1974:[125]

> "The true rule about a stay under section 41. . . may I think be stated thus: (I) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of the proof is on the defendant."[126]

As a consequence of this strict position, dismissals were refused regardless of the lack of connection between the parties or the action and England.[127]

Decades later, *The Atlantic Star* decision diluted the "vexatious and oppressive" test of *St. Pierre* and replaced it with a more liberal approach based on abuse of process.[128] Although the court in *The Atlantic Star* denied a general recognition of *forum non conveniens*, this opinion together with the *McShannon*[129] case in 1978, revolutionized the law and demonstrated an increasing consideration for the foreign element.[130] The court in *MacShannon* ended the restrictive possibilities of staying an action on abuse of process and Lord Diplock reformulated Justice Scott's test:

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124. Owners of the Motor Vessel "Atlantic Star" v. Owner of the Motor Vessel "Bona Spes," 1973 Q.B. 364, 382 (Eng. C.A.).

125. *See* Alan Reed, *To Be or Not to Be: The Forum Non Conveniens Performance Acted Out on Anglo-American Courtroom Stages,* 29 GA. J. INT'L & COMP. L. 31, 83 (2000).

126. St. Pierre v. S. Am. Stores (Gath and Chaves), Ltd., 1936 1K.B. 382, 398 (Eng. C.A.).

127. *See Maharanee of Baroda*, [1972] 2 Q.B. at 283.

128. *The Atlantic Star*, 1973 Q.B. at 382.

129. MacShannon v. Rockware Glass, Ltd., 1978 A.C. 795 (appeal taken from Eng. C.A.).

130. *See* Aarif Barma & David Elvin, *Forum Non Conveniens: Where Do We Go from Here?,* 101 L.Q.R. 48, 52 (1985).

> "In order to justify a stay two conditions must be satisfied, one positive, the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience and expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or judicial advantage which would be available to him if he invoked the jurisdiction of the English court."[131]

Both *McShannon* and *The Atlantic Star* pointed out the need for greater consideration of the "appropriateness" element.[132] Thus, the doctrine changed from the restrictive "abuse of process" test to the broader "most suitable forum" test. The court in the *Abidin Daver* case recognized this evolution in Lord Diplock's statement that "judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now ripe to acknowledge frankly is. . . indistinguishable from the Scottish legal doctrine of forum non conveniens."[133] The court thereby confirmed the *de facto* incorporation of the Scottish doctrine into English law and established the test for stays based on *forum non conveniens*. This test was formulated as a "balancing of all the relevant factors on either side, [private and public,] those favouring the grant of a stay on the one hand and those militating against it on the other."[134]

Along with this development came the assimilation of Order 11 of the Rules of the Supreme Court and stay cases.[135] Until the 1973 *Atlantic Star* case, the issue of declining jurisdiction in England arose in two different contexts: motions brought by defendants to stay proceedings under the *St Pierre* test, and plaintiffs' applications under Order 11 for leave to serve process on defendants outside Great Britain.[136] *The Atlantic Star* court started the assimilation of both regimes. This process was finalized in the House of Lords decision in *Spiliada Maritime Corp. v. Cansulex Ltd.*[137] This case involved both a motion to stay the proceedings on grounds of *forum non conveniens* and a motion to

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131. *MacShannon*, 1978 A.C. at 795.

132. *See* Barma & Elvin, *supra* note 130, at 53.

133. The Abidin Daver [1984] 1 A.C. 398, 411 (appeal taken from Eng. C.A.).

134. *Id.* at 419.

135. *See The Atlantic Star,* 1973 Q.B. at 382; *see also* Spiliada Maritime Corp. v. Cansulex Ltd., [1987] 1 A.C. 460, 476 (appeal taken from Eng. C.A.).

136. *See* Robertson, *supra* note 84 at 410.

137. *See Spiliada Maritime Corp.*, [1987] 1 A.C. at 476.

set aside a leave to serve defendant out of the jurisdiction under Order 11.[138] In his decision, Lord Goff held that the criteria for both stay applications and for Order 11 applications were identical.[139] This assimilation is, however, subject to an exception. For stay applications, the defendant bears the burden of proof; for applications under Order 11, the onus is on the plaintiff.[140] The basic principles were summarized by Lord Goff:

> "(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
>
> (b). . .[I]n general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay.
>
> (c). . . In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate that the English Forum. . . I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.
>
> (d). . .[T]he court will look first to see what factors there are which point in the direction of another forum. . .So it is for connecting factors. . .that the court must first look; and these will include not only factors affecting convenience or expense (such as the availability of witnesses), but also other factors such as the law governing the relevant transaction. . .and the places where the parties respectively reside or carry on a business.
>
> (e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay.

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138. Reed, *supra* note 125, 85.
139. *Id.* at 86.
140. *Id.*

> (f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. . .[O]n this inquiry, the burden of proof shifts to the plaintiff."[141]

The court therefore established a two stage inquiry which requires the judge to determine: (1) another forum which is clearly more appropriate, and (2) whether the requirements of justice nevertheless require that a stay be granted.[142] This statement of the law was recently confirmed by the House of Lords in *Lubbe v. Cape PLC*.[143] The defendant, Cape Industries PLC, ran asbestos operations in South Africa.[144] More than 3,000 plaintiffs sued the corporation for wrongful deaths and injuries resulting from exposure to asbestos.[145] Cape Industries moved for a stay on grounds of *forum non conveniens*, arguing that the appropriate forum was South Africa.[146] Basing its opinion on the *Spiliada* test, the trial judge held that the action was distinctly more related to South Africa and stayed the proceedings.[147] The House of Lords confirmed that, based on the *Spiliada* test, England was not the natural forum.[148] The court held, however, that under the circumstances, justice required that the stay should not be granted.[149] Considering the lack of legal aid funds[150] and the inexperience of the South African forum in handling group actions, it was unlikely that the plaintiffs would obtain justice.[151]

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141. *Spiliada Maritime Corp.*, [1987] 1 A.C. at 476-78.

142. *See* PETER NORTH & JAMES FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 336-47 (13th ed. 1999).

143. Lubbe v. Cape PLC., [2000] 1 W.L.R. 1545, 1561 (appeal taken from Eng. C.A.).

144. *Id.* at 1550.

145. *Id.* at 1549.

146. *Id.* at 1561.

147. *Id.* at 1551.

148. *See id.* at 1559.

149. *Lubbe*, [2000] 1 W.L.R. at 1559.

150. This element had been held to be insufficient by Lord Goff in *Connelly v RTZ Corp. plc* [1998] A.C. 854 at 873. He wrote that even in sophisticated legal systems, financial assistance for litigation was not necessarily regarded as essential. He illustrated this assertion by the fact that until 1949 such aid was not widely available in Great Britain.

151. *Lubbe*, [2000] 1 W.L.R. at 1559.

Lord Bingham expressed a position which differs from the American *forum non conveniens* doctrine in deciding thatpublic interest considerations have no bearing on the court's decision.[152]

More than a century after the first use of the Latin phrase in Scottish law, the doctrine of *forum non conveniens* appeared to be settled in the English legal system. An important restriction, however, on the use of *forum non conveniens* by British courts came into effect only a few months after the *Spiliada* decision.[153] The Brussels and Lugano Conventions and the recent EC Council Regulation[154] have opted for the civilian solution of *lis pendens*.[155] Therefore, the principles established in *Spiliada* are subject to certain limitations. The question of whether *forum non conveniens* still had a place in English law has been much debated but no general answer has been reached.[156] It is, however, accepted that courts have no discretion to decline jurisdiction on grounds of *forum non conveniens* where the appropriate forum is in another Member State.[157] But where the appropriate forum is a Non-Member State, English courts may still use the doctrine of *forum non conveniens* to decline jurisdiction. This solution was retained by the English Court of Appeals in *In re Harrods*.[158] The court held that it should stay an action brought against a defendant domiciled in England on the grounds that the appropriate forum was the court of a non-member state.[159] The case was referred to the European Court of Justice (ECJ) but was withdrawn because the suit had been settled.[160] This decision remains very controversial and criticized for its propensity to affect the

152. *Id.* at 1561.

153. *See* Fawcett, *supra* note 23, at 11.

154. Council Regulation No. 44/2001, *supra* note 7.

155. Article 27 of the Regulation, which substitutes articles 21 of the Brussels and Lugano Conventions, states: "Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established." *Id.*

156. *See* ADRIAN BRIGGS & PETER REES, CIVIL JURISDICTION AND JUDGMENTS 221-23 (3rd ed. 2002).

157. *Id.* at 223.

158. In re Harrods (Buenos Aires) Ltd., 1992 Ch. 72 (Eng. C.A.). For an analysis of the case, *see* Wendy Kennett, *Forum Non Conveniens in Europe*, 54 CAMBRIDGE L.J. 552, 561-69 (1995).

159. *In re* Harrods, 1992 Ch. 72.

160. 1 LAWRENCE COLLINS ET AL., DICEY & MORRIS ON THE CONFLICT OF LAWS 394 (13th ed. 2000).

harmonization of European law.[161] The same issue arose in a more recent case,[162] but the English Court of Appeals refused to refer the question to the ECJ, arguing that it would cause expense and delay.[163] Therefore, the doctrine of *forum non conveniens* still applies in England even though its scope has been narrowed to cases where the alternative forum is not a member state of the European community.

IV. CONSIDERATIONS FOR THE INCLUSION OF BOTH DOCTRINES IN AN INTERNATIONAL CONVENTION ON JURISDICTION AND JUDGMENTS

Why not adopt a Brussels-type convention, which would elect one of the two doctrines? Such a proposal is unreasonable from both a political and a legal perspective. Politically, it is apparent that participating countries would not agree to a convention that would limit the ability to decline jurisdiction pursuant to their own respective doctrines. The context of the Hague negotiations is different than that of the Brussels Convention. The Brussels Convention was originally negotiated and signed exclusively by countries of civil law tradition who did not include a provision on *forum non conveniens*,[164] whereas the Hague negotiations are taking place between countries which strongly practice both *lis pendens* and *forum non conveniens*. Therefore, the solution could not be a Brussels-type one of opting exclusively for either one of the two doctrines. Such a solution would be undesirable from a legal standpoint, too, since both doctrines are admittedly imperfect but undeniably necessary for a proper administration of justice.

161. *See id.* at 393-95.

162. Hamed el Chiaty & Co. v. The Thomas Cook Group Ltd. (The "Nile Rhapsody"), [1994] 1 Lloyd's Rep. 382 (Eng. C.A. 1993).

163. *See id.* at 392.

164. The Brussels Convention was originally negotiated and signed exclusively by countries of civil law tradition. Therefore, the countries did not include a provision on *forum non conveniens*. When the United Kingdom and Ireland entered into the European Community, their attempts to add a *forum non conveniens* provision remained unsuccessful.

A. The Case for a Lis Pendens Provision: Avoiding Parallel Litigation

1. The Problems of Parallel Litigation

As mentioned earlier, *lis pendens* rules in civil law countries are intended to avoid the costs of parallel litigation, both in terms of time and money, for the parties and for the judicial systems. Parallel litigation is wasteful in the sense that the parties have to present their case twice. Evidence must be duplicated. Witnesses must appear in both courts. If experts are needed, the parties must pay for them to appear in the other court, or find and remunerate other experts to testify in the second court. In addition, each litigant must bear increased representation costs, traveling expenses, and the psychological effects of being a party to a dispute. This duplication is a burden not only for the litigants, but also for the courts. The courts of most countries already face congestion and delay. Parallel litigation only increases these difficulties.

Parallel litigation also raises the question of judgment consistency. If the two parallel proceedings were to reach a consistent outcome, the successful resolution of the dispute could help erase the concerns over the waste created by parallel litigation. A major problem, however, arises when the two courts apply different legal solutions and thus reach conflicting judgments. In such instance a new dispute is likely to arise, thus, worsening the waste of time and money.

Therefore, an international regime on jurisdiction and enforcement of judgments must set forth a mechanism to prevent these problems of parallel litigation.

2. The *Lis Pendens* Mechanism: A Solution to the Problem?

Advocates of the *forum non conveniens* doctrine recognize the necessity of avoiding useless litigation when a case is pending before two jurisdictions at the same time. They point out, however, that *lis pendens* encourages a "race to the courthouse."[165] As previously mentioned, under *lis pendens*, the second court seized must stay its proceedings until the first court seized establishes jurisdiction. Thus, natural defendants might be tempted to race to

165. *See* Peter E. Herzog, *Brussels and Lugano, Should You Race to the Courthouse or Race for a Judgment?*, 43 AM. J. COMP. L. 379 (1995).

bring an action in a certain jurisdiction in order to block the action of the natural plaintiff in the appropriate forum. Common law countries argue that a system allowing courts to consider certain notions of fairness and proper administration of justice will correct this dysfunction. Therefore, criticism addressed to systems such as the French and German is not directed at the notion of *lis pendens* itself, but rather to the fact that the systems are based solely on this doctrine. The presence of *lis pendens* in the Hague compromise was not very controversial as long as it was balanced by a mechanism allowing the courts to avoid certain abuses.

Another problem of the "first-to-file" rule lies in international incoherence when countries apply definitions differently. For instance, as previously mentioned the French and German rules on *lis pendens* are similar in definitional terms.[166] But the French rules are not favorable to German courts because German law defines the pendency of a claim and the filing of the complaint differently.[167] Under German law, pendency takes effect only when the defendant has been served with process.[168] On the contrary, most countries, like France, consider that the pendency of the claim takes effect when it is filed.[169] Consequently, this may create problems in international litigation where a certain time elapses between the filing of the complaint and the serving of the process on the defendant. For instance, a complaint may be filed first in Germany, then in France before process has been served in Germany, and still be considered to be pending first in France. The German court would consequently have to suspend or dismiss the German action.

Therefore, providing for a lis pendens provision in an international regime would require a generally acceptable definition of its elements, such as the basic definition of pendency, in order to achieve international coherence and uniformity.

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166. *See* Gaudemet-Tallon, *supra* note 65, at 181.

167. *See* Dr. Anke Freckmann & Dr. Thomas Wegerich, THE GERMAN LEGAL SYSTEM 151 (Sweet & Maxwell, 1999) (discussing the difference between Anhängigkeit and Rechtshängigkeit; the filing of the complaint and the pendency of the claim).

168. § 261 Nr. 1-3 ZPO (F.R.G.), *translated in* GERMAN COMMERCIAL CODE & CODE OF CIVIL PROCEDURE IN ENGLISH 257 (Charles E. Stewart trans., 2001).

169. *See generally* Gaudemet-Tallon, *supra* note 65, at 181.

B. Forum Non Conveniens in the International Compromise: Searching for the Most Suitable Forum

1. Presentation of the Critiques of *Forum Non Conveniens*

The doctrine of *forum non conveniens* has been criticized for its "numerous inherent vices."[170] The main critique of the doctrine, which best explains why fervent proponents of *lis pendens* dislike *forum non conveniens*, is that it endangers civil law's cherished certainty and predictability.[171] In the 1947 case that recognized the doctrine in the United States, *Gulf Oil Corp.*, Justice Black's dissent foresaw that "[t]he broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment, will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible."[172]

The relevance of Black's prediction, which was based on a list of eleven factors that the Court established, is reinforced today as subsequent decisions have increased the list.[173] The best practical illustration of this chaos is the embarrassing fact that different courts dealing with similar fact patterns may happen to reach conflicting outcomes.[174] Therefore, the fear of unpredictability resulting from the application of the present *forum non conveniens* doctrine appears to be justified.

Another critique of *forum non conveniens*, which is related to the first critique, is that trial courts are granted too much discretion.[175] The *forum non conveniens* test gives wide discretion to courts in searching for the most appropriate forum among several which may all have an interest in deciding the case.

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170. *See* Hu Zhenjie, *Forum Non Conveniens: An Unjustified Doctrine*, 48 NETH. INT'L L. REV. 143, 152 (2001).

171. American Dredging Co. v. Miller, 510 U.S. 443, 455 (1994) (Justice Scalia recognized the problem and wrote: "[t]he discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application, . . ., make uniformity and predictability of outcome almost impossible.").

172. *Gulf Oil Corp.*, 330 U.S. at 507 (Black, J., dissenting).

173. *See* Harry Litman, Comment, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CAL. L. REV. 565, 575-76 (1986) (providing an example of California where the list has been extended to 25 factors).

174. *See* David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L. L.J. 353, 360 (1994).

175. Zhenjie, *supra* note 170, at 118.

American decisions on *forum non conveniens* are rarely reversed for abuse of discretion "when [the court] has dutifully recited the *Gulf Oil* factors and stated a conclusion."[176] A mere statement by the court that a balance of private and public interests supports its holding will generally suffice. Therefore, the fairness sought by the doctrine may be affected by this lack of true judicial review.

The doctrine has also been criticized for its tendency to assist multinational corporations to free themselves of claims by foreign plaintiffs. Justice Lloyd Doggett's dissent in *Dow Chemical Co. v. Castro Alfaro*[177] expressed this critique in the following terms:

> To accomplish the desired social engineering, they must invoke yet another legal fiction with a fancy name to shield alleged wrongdoers, the so-called doctrine of forum non conveniens. The refusal of a Texas corporation to confront a Texas judge and jury is to be labeled 'inconvenient' when what is really involved is not convenience but connivance to avoid corporate accountability.[178]

The doctrine of *forum non conveniens* does not by itself mean that foreign plaintiffs are deprived of their day in court. Parties who face a *forum non conveniens* dismissal may still bring the case in the appropriate forum. Nevertheless, dismissal of their claim by application of the doctrine is often outcome determinative.[179] The result from dismissals is that multinational corporations are not judged according to their own country's standards. Thus, wrongful acts by multinational corporations remain unpunished and victims uncompensated. *In re Union Carbide Corporation Gas Plant Disaster* presents a controversial illustration of this problem.[180] In December 1984, India faced a disaster when a chemical plant leaked deadly gas which caused the death of thousands of inhabitants of a Bhopal suburb.[181] Class actions were brought in the United States and were eventually consolidated in a New York

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176. *See* Stein, *supra* note 119, at 832.

177. *See generally Dow Chem. Co.*, 786 S.W.2d at 674 (rejecting the application of the *forum non conveniens* doctrine in personal injury actions brought under the Wrongful Death Act).

178. *Id.* (Doggett, J., dissenting).

179. *See* Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL. L. REV. 650, 671 (1992).

180. *In re* Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd* 809 F.2d 195 (2d Cir. 1987).

181. *Id.*

district court, which dismissed the suit on grounds of *forum non conveniens*.[182] The court found that the balance of public and private interest factors weighed in favor of dismissal, which was upheld by the appellate court.[183] The case did not go to trial in India and was settled far below the $250 billion claimed, leaving many of the victims uncompensated.[184] The unfairness of the outcomes in such cases and the reduced liability of multinational corporations have been used as an argument against the *forum non conveniens* doctrine.

Another criticism of the doctrine is the discrimination it implies between foreign and national plaintiffs.[185] This is seen in *Piper Aircraft*, where the U.S. Supreme Court held that it is reasonable to assume that a plaintiff's choice of his national forum is convenient, whereas this assumption is less reasonable where a foreign plaintiff chooses the U.S. forum.[186] This critique does not touch upon the doctrine of *forum non conveniens* itself but rather upon one aspect of the court's application. The relevance of this critique will also be discussed in the next part.

Yet another critique of the *forum non conveniens* doctrine relates to its relevance in today's world. The doctrine was born to avoid the undue hardship potentially imposed on litigants by the inconvenience of the forum where the suit was brought.[187] The inconvenience was greater as transportation and communication were limited in those times. For example, it was noted that when the 1947 U.S. Supreme Court *Gulf Oil Corp.* decision was rendered, "[w]e had no commercial jet travel, no personal or office computers, no photocopy technology, [and] no fax machines."[188] This reasoning explains Judge Oaks' dissenting opinion that "[o]ne may wonder whether the entire doctrine of *forum non conveniens* should not be reexamined in the light of the transportation revolution that has occurred since then."[189] The legitimacy of this critique increases, especially considering that nowadays witnesses

182. *Id.*
183. *Id.*
184. *See* Malcolm J. Rogge, *Towards Translational Corporate Accountability in the Global Economy: Challenging the Doctrine of Forum Non Conveniens in In Re: Union Carbide, Alfaro, Sequihua, and Aguinda*, 36 TEX. INT'L L.J. 299, 303 (2001).
185. *See* Zhenjie, *supra* note 170, at 159-60; *see also* Litman, *supra* note 173, at 575-76.
186. *See Piper Aircraft*, 454 U.S. at 256.
187. *See* Robertson, *supra* note 174, at 367; *see also* Barrett, *supra* note 76, at 388.
188. *See* Robertson, *supra* note 174, at 367.
189. *See* Fitzgerald v. Texaco, Inc., 521 F.2d 448, 456 (2d Cir. 1975).

can be more easily heard and the improvement of international postal services and electronic transfers has rendered the discovery procedure less fastidious.

2. Discussion of the Critiques

As mentioned above, the *forum non conveniens* doctrine was criticized for the discrimination that its current application generates between foreign and national plaintiffs.[190] When answering the question of whether this discrimination is acceptable, national plaintiffs argue that they are more entitled than foreign plaintiffs to have their disputes heard by their national courts because they, as citizens, bear the cost of the judicial services. Taken to the extreme, however, this justification could lead to an argument that national plaintiffs who do not pay taxes could be refused access to the courtroom. Rights based on taxpaying considerations, such as voting rights, have long been abandoned for their inherent unfairness and the dangers of oppression that they engender. The same should be true about access to the courtroom, upon which tax paying considerations should have no bearing.

In *Piper Aircraft*, the Court found it reasonable to assume that it would be more convenient to litigate a dispute in the national courts of the plaintiff.[191] This assertion, however, may be legitimately challenged. In fact, in *Piper Aircraft* itself, the foreign plaintiffs brought the action in the defendant's home forum, at the plaintiffs' own inconveniences. One may wonder why less deference should be given to the foreign plaintiff's choice of forum in such circumstances. The Court in *Piper* does not give further justification for this convenience argument and if its holding was based on discriminatory grounds rather than on mere convenience, the *Piper* decision could be challenged as a violation of the equal rights guaranteed by Article 7 of the Universal Declaration of Human Rights.[192]

Although this critique of *forum non conveniens* is justified, it

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190. *Piper Aircraft*, 454 U.S. at 260-61; *see* Zhenjie, *supra* note 170, at 159-60; *see also* Litman, *supra* note 173, at 575-76.

191. *See Piper Aircraft*, 454 U.S. at 255-56.

192. David Westin, *Foreign Plaintiffs in Products Liability Actions: The Defense of Forum Non Conveniens by Warren Freedman*, 83 AM. J. INT'L .L. 438, 439-40 (1989) (reviewing WARREN FREEDMAN, FOREIGN PLAINTIFFS IN PRODUCTS LIABILITY ACTIONS: THE DEFENSE OF FORUM NON CONVENIENS (1988)).

must not cause the exclusion of the doctrine from the drafting of an international regime. In fact, it does not challenge the whole doctrine but only one aspect of its application. A single provision in the international instrument that the courts may not discriminate on the basis of the plaintiff's nationality in their analysis would be theoretically sufficient to eradicate this drawback.

Another argument against *forum non conveniens* focuses on the reduced responsibility assumed by multinational corporations. This critique, however, has an inherent shortcoming in the sense that if cases like *Union Carbide* were not dismissed, the United States would be exporting "its laws, policies, and social mores and imposing them on sovereign foreign nations."[193] Damages awarded by American juries would be substantially more important than those that a foreign court would award, which would disrupt the foreign court's policies. Developing countries seeking to attract investors must accept the need to diminish these investors' financial responsibility because of the "economic benefits which flow from encouraging financial risk-taking and economic innovation."[194] Low awards in those cases are an expression of this acceptance by the foreign sovereign in order to attract foreign corporations and stimulate economy. Although this may seem shocking, it is a matter of national policy that an outsider cannot challenge. Moreover, the amount of damages awarded in the United States is assessed according to the American society, and its general financial needs (such as the cost of cares). The same amounts would not be appropriate for plaintiffs of developing countries with different earnings and living expenses. This also directly relates to the problem of accessibility and ability to construe the foreign law designated by conflict of law rules. American judges do not always have the linguistic, sociological, and cultural background that would enable them to render objective decisions.

Another critique is that the development of communication and transportation has facilitated the availability of witnesses and documents, and thus reduced the need for a *forum non conveniens* approach. Yet the same evolution type argument can be used to

193. Carney, *supra* note 92, at 456.

194. *See* Jay Lawrence Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 TEX. INT'L L. J. 321, 324 (1985).

support the position that it is now easier for plaintiffs to file a suit in an inappropriate forum. The *Union Carbide* case has shown that thanks to modern means of transportation and communication, poor inhabitants of the Bhopal suburbs were able to bring claims of up to $50 billion in the United States.[195] Consequently, the argument that the *forum non conveniens* doctrine is less relevant today does not seem conclusive.

Therefore, two of the critiques have obvious shortcomings. The doctrine is still relevant today despite the reduction in today's world of possible inconveniences; and the unfairness created by the use of the doctrine by MNCs is balanced by the necessity to restrain from imposing U.S. policies over other nations. The critique of the unjustified discrimination based on the nationality of the plaintiff is a relevant one that needs to be taken into consideration and thus prevented. It should not, however, jeopardize the use of a *forum non conveniens* element in the future international regime. The two other critiques regarding excessive judicial discretion and the unpredictability that it generates are more problematic with regards to the inclusion of the doctrine in an international instrument on jurisdiction and judgments. Yet these drawbacks seem to be outweighed by the policy considerations which support the doctrine of *forum non conveniens*, and its crucial role in the legal systems that apply it.

3. Policy Considerations Supporting the Doctrine of *Forum Non Conveniens*

Different policy rationales may be identified that justify the *forum non conveniens* doctrine. The categories that follow are not hermetical and often one factor considered by a court in a *forum non conveniens* analysis may very well serve two different policies.

i. Convenience to the Courts

This policy focuses on the efficient allocation of judicial resources. When dealing with unrelated cases, courts may face complex conflict of laws questions. This policy was expressed by the court in *Gulf Oil Corp.* when it stated that "[t]here is an appropriateness. . . in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather

195. *See* Rajeev Dhavan, *For Whom? And For What? Reflections on the Legal Aftermath of Bhopal*, 20 TEX. INT'L L. J. 295 (1985).

than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."[196]

Another advantage of *forum non conveniens*, which serves the policy of convenience to the courts, is that it helps solve the problem of crowded dockets. This interest is mentioned later as an independent policy.

ii. Convenience to the Parties

In *Gulf Oil Corp.*, the Court pointed out that litigation can present a number of practical problems. Among those problems are access to proof, availability of witnesses, and the possibility to view premises.[197] This policy of convenience to the parties requires the court to adopt a "balance of conveniences" test.[198] The concern is not that the litigation might be inconvenient to the plaintiff, who chose the forum and thus accepted possible inconveniences, but rather that the defendant should not be forced to litigate in a clearly inconvenient forum. The *Gulf Oil Corp.* Court made it clear by stating that the plaintiff's choice of forum should not be disturbed unless she chose a forum in order to "'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."[199]

iii. Fairness to the Community: Jury Duty

The *forum non conveniens* doctrine also serves a policy that "[j]ury duty is a burden that ought not to be imposed upon people of a community which has no relation to the litigation."[200] This policy focuses both on the unfairness of imposing costly and time-consuming jury duty on a community having no relationship to the dispute, and on the risk of confusion and misunderstandings that may result from the application of foreign standards by local juries.[201]

This policy may seem less relevant from an international perspective than from a national one. In fact, a large number of legal systems have abolished or restricted jury trials which are

196. *See Gulf Oil Corp.*, 330 U.S. at 509.

197. *Id.* at 508. For a British case referring to the availability of witnesses, *see Spiliada Maritime Corp.*, [1987] A.C. at 476.

198. *See Piper Aircraft*, 454 U.S. at 256 n. 23.

199. *See Gulf Oil Corp.*, 330 U.S. at 508.

200. *See id.* at 508-09.

201. *See Piper Aircraft*, 454 U.S. at 243-244.

often seen as an inefficient method of reaching judgments. Out of the four countries that we have studied, only the United States still uses jury trials extensively. France, Germany, and England have sharply reduced this device. Nevertheless, this policy is a legitimate one for the United States, which is a major participant to The Hague negotiations and should therefore be taken into consideration in the drafting process.

iv. Preventing Docket Congestion

The policy of preventing docket congestion is a category that is directly related to some of the policies previously mentioned. For instance, it will be a factor of convenience to the courts but also a factor of fairness to the community. Indeed, unrelated litigation may cause delays in the treatment of the community cases and thus impose an unfair burden on community members. This major problem was pointed out by the dissent in the Texas Supreme Court *Dow Chemical* case in these terms: "'Bhopal'-type litigation, with little or no connection to Texas will *add* to our already crowded dockets, forcing our residents to wait in the corridors of our courthouses while foreign causes of action are tried."[202] The doctrine of *forum non conveniens* is therefore crucial for magnet fora, such as the United States.

American courts are a classic target of forum shopping because "[s]imply put, compared with other foreign courts, United States forums offer a plaintiff both lower costs and higher recovery."[203] Litigation costs are low because the American contingent fee system allows litigants with limited financial means to bring actions they could not otherwise afford. This system, which juries know, leaves only a certain percentage of the damages to litigants, and along with the high American living standards and the poor social safety net, contribute to the high damages awarded by U.S. courts.[204] This explains why American courts are a good place to "shop in."

It results from what precedes that *forum non conveniens*, although not perfect, has a role to play in a future international

202. *Dow Chem. Co.*, 786 S.W.2d at 690.

203. Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L. J. 321, 323 (1994).

204. *See* Russell J. Weintraub, *The United States as a Magnet Forum and What, If Anything, to Do About It*, *in* INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 213, 216-17 (Jack L. Goldsmith ed., 1986).

convention on jurisdiction and judgments, be it the current proposed Hague Convention or another future proposal. All the policies underlying the doctrine are legitimate ones and cannot be ignored in drafting a fair international regime.

V. Approaching a Compromise on the Issue of Declining Jurisdiction

The following is an evaluation of the compromise that was achieved in the Hague Convention negotiations. However, considering that the scope of this study is not limited to the Hague Compromise but rather that it intends to be used as a basis for future projects, an attempt to determine what would be an ideal system, if any, to deal with the question of declining jurisdiction, should be free from historical and ideological backgrounds.

A. An Ideal Provision for Declining Jurisdiction

1. The Goals

The previous section of this article demonstrated that both doctrines are important. Although imperfect, they both serve legitimate goals. Therefore, an ideal system must create a balance between the need for some judicial discretion, enabling judges to work towards a fair and efficient administration of justice, and the necessity that legal predictability remain unaffected by this discretion. The idea is to take the best of all the systems we have studied while attempting to neutralize their drawbacks.

Reaching a compromise between two apparently conflicting positions requires participants to identify areas of common interests. Both common law and civil law systems recognize the need to prevent useless litigation conducted simultaneously in two fora. Lack of such provisions would lead to a waste of time and money if the same outcome were decided by both Courts and a useless complication if the courts reach two conflicting decisions. Therefore, the ideal solution must provide that when the same parties are engaged in proceedings based on the same cause of action, one of the courts seized shall suspend its proceedings. The question that arises is which of the two courts (first or second seized) should be given priority.

It seems that a first-in-time rule to determine which court should suspend its proceedings is the most appropriate solution. A provision giving priority to the second court seized would not be

supported by any particular needs and would only cause a waste of the time and expenses already incurred in the first court seized. Therefore, the text would provide that the second court seized shall suspend the proceedings.

At this stage, such a clause would closely resemble the *lis pendens* provisions as applied by civil law countries. Nevertheless, I have mentioned that a civil law *lis pendens* provision causes a "race to the court" and thus endangers the fairness of the process.[205] Consequently, the ideal system would not be a pure civil law *lis pendens* provision. It should include a mechanism enabling the judge to consider the fairness of the process and the appropriateness of the forum, thus including elements of the *forum non conveniens* doctrine.

However, here comes the crucial question of how to articulate the two elements. Should the *forum non conveniens* element be a separate mechanism or part of the *lis pendens* clause? Creating a system with a separate *forum non conveniens* provision would effectively balance the *lis pendens* clause, but would leave the judge with discretion to decline jurisdiction, even absent parallel proceedings. This possibility resuscitates the risk of unpredictability. On the contrary, including the *forum non conveniens* element into, and as an exception to, the *lis pendens* clause would solve the inherent unfairness of *lis pendens* and simultaneously provide results that would be predictable enough for the parties to foresee possible judicial outcomes.

2. Drafting the Ideal Provision

The essence of a provision for an international convention on the issue of declining jurisdiction could therefore be drafted as follows:

> When the same parties are engaged in proceedings based on the same cause of action in courts of different contracting states, the second court seized shall suspend the proceedings.
>
> Paragraph (1) does not apply, if the first court seized finds, on application by a party, that it is a clearly inappropriate forum and that the second court seized would be a clearly more appropriate forum.
>
> If the second court seized has already suspended its proceedings

205. *See* Herzog, *supra* note 165, at 379.

pursuant to paragraph (1), it shall proceed with the case if the condition set forth in paragraph (2) is met.

The two prongs of the test set forth in paragraph 2 must be cumulative. Thus, if the forum seized considers the alternative court clearly more appropriate but does not find itself clearly inappropriate, the case will still be tried in an appropriate, although not the most appropriate, forum. If the first court seized considers that it is a clearly inappropriate forum, but that the second court seized is not a clearly more appropriate forum, the case would be tried in the least inappropriate of the two fora. The defendant would still have a chance to bring the case before a clearly more appropriate forum and then move to have the first court seized decline jurisdiction in favor of the other forum.

Although this system deprives a court of its ability to decline jurisdiction absent parallel proceedings, it would still solve the problem of crowded dockets in magnet fora. Indeed, defendants would still be given a chance to invoke the inappropriateness of the forum. They would only have to take the case before the natural forum and then bring a motion under paragraphs (2) or (3) to have the first court seized decline jurisdiction. The burden on defendants of bringing another suit in the appropriate forum does not seem unreasonable considering the potential gains that would result for them.

This system would also solve the problem of the race to the court by providing a better consideration of the forum's appropriateness. Thus, the race by a natural defendant to an inconvenient court for the sole purpose of neutralizing a plaintiff would be pointless, provided that the seized by the natural defendant objectively recognizes itself inappropriate. The risk that the court first seized would not declare itself a clearly inappropriate forum, where it objectively should, would be left to the control of international comity and to the fact that a court so violating the spirit of the convention would place itself in a position where other courts in a reversed case would do alike.

B. Comments on the Hague Compromise

The compromise found at the Hague is not similar to the above proposed provisions. The negotiations resulted in a system including elements of both *lis pendens* and *forum non conveniens* but in two separate articles.

1. The *Lis Pendens* Element: Article 21 of the Interim Text

The first part of this system is Article 21 of the Interim Text, which reads as follows:

> 1.When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction under Articles [white list] [or under a rule of national law which is consistent with these articles] and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 [11] or 12.
>
> 2.The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.
>
> 3.Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.
>
> 4.The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.
>
> 5.For the purpose of this Article, a court shall be deemed to be seised
>
> > a) when the document instituting the proceedings or an equivalent document is lodged with the court; or
> >
> > b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.
>
> [As appropriate, universal time is applicable.]
>
> 6.If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court

second seised

a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised; and

b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

In brief, this provision is a *lis pendens* clause, which states that where the same parties are engaged in proceedings based on the same causes of action, the court second seized (court B) shall suspend the proceedings if the court first seized (court A) has jurisdiction under the convention and if the judgment of court A is expected to be recognized later in the state of court B.[206] Article 21 of the Interim text is therefore a classic *lis pendens* clause. The formulation of the clause is similar to the German system in that it expressly requires identity of the parties and identity of the cause of action.[207] This consequently avoids the vagueness of the French "same dispute" standard.[208] The requirement is even further clarified by a statement that the relief sought by the parties is irrelevant to the question of whether the parties are engaged in proceedings based on the same cause of action.[209] Thus, an action brought in France seeking damages for breach of contract and an action brought in England seeking specific performance for the same breach of contract will be governed by Article 21.

Certain elements have been added to this classic *lis pendens* rule to ensure an efficient system and to avoid the drawbacks that were previously noted.[210] The major problem of a *lis pendens* clause is that it encourages a race to the court. Natural defendants may be tempted to bring a negative suit in a forum more favorable

206. *See* Gaudemet-Tallon, *supra* note 65, at 181.
207. *See id.* at 197.
208. *See id.* at 180-81.
209. *See id.* at 199.
210. *See id.* at 180-81.

to their position and inconvenient for the natural plaintiff in order to block the proceedings. This problem is efficiently dealt with in the Interim text. Article 21(6) states that if the action brought in court A seeks a determination that the plaintiff has no obligation to the defendant, and if an action seeking substantive relief is brought in court B, then court B does not have to suspend its proceedings.[211] To ensure that the *lis pendens* mechanism will not result in the suit being lost in a court, article 21(3) states that court B may proceed with the case if the plaintiff in court A has not taken the necessary steps to bring the proceedings to a decision on the merits or if court A has not decided on the merits within a reasonable time.[212] Eventually the *lis pendens* clause is balanced by article 21(7) which states that it does not apply if court A finds that court B is a clearly more appropriate forum to resolve the dispute.[213] Thus, the clause includes the consideration of the appropriateness element. It differs, however, from the system that we described in the previous part in the sense that article 21(7) refers to a separate article: article 22.

2. A Separate *Forum Non Conveniens* Element: Article 22 of the Interim Text

Article 22 of the Interim text is entitled "Exceptional circumstances for declining jurisdiction" and reads as follows:

> 1.In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defense on the merits.
>
> 2.The court shall take into account, in particular:
>
> a) any inconvenience to the parties in view of their habitual residence;

211. Hague Convention on Jurisdiction and Judgments, Interim Text, art. 21(6).
212. *Id.* at art. 21(3).
213. *Id.* at art. 21(7).

> b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;
>
> c) applicable limitation or prescription periods;
>
> d) the possibility of obtaining recognition and enforcement of any decision on the merits.
>
> 3.In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.
>
> 4.If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, or if it is in a non-Contracting State, unless the defendant establishes that [the plaintiff's ability to enforce the judgment will not be materially prejudiced if such an order is not made] [sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced].
>
> 5.When the court has suspended its proceedings under paragraph 1,
>
> a)it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court; or
>
> b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

In brief, Article 22 states that the court may, on application by a party, suspend its proceedings if it is clearly inappropriate for that court to exercise jurisdiction and if a court of another state has jurisdiction and is clearly more appropriate to resolve the dispute.[214] Being a mechanism in itself, Article 22 is applicable even absent a situation of parallel proceedings. Therefore, judges are given discretionary power to decline jurisdiction for a goal other than preventing the problems of simultaneous proceedings

214. *Id.*

in two different fora. This discretionary power is enhanced by the use of the word "may" instead of "shall" in Article 22(1). However, Article 22 is drafted in a manner that limits the drawbacks of the *forum non conveniens* doctrine. The first of the restricting aspects of the clause is that the interim text explicitly limits the use of article 22 to "exceptional circumstances."[215] Secondly, the text grants the court the power to suspend the proceedings and not to dismiss them.[216] This mitigates the outcome determinative effect of the mechanism which was previously addressed in this study.[217] Indeed, it allows resumption of the action if the "most appropriate" forum does not exercise jurisdiction.[218] But the outcome determinative effect is not completely neutralized. When the court has suspended its proceedings pursuant to article 22(1), it is bound to decline jurisdiction even if the plaintiff does not bring the case in the "most appropriate" forum.[219] Thus, it ensures that a corporation like Union Carbide, for instance, will eventually assume responsibility for its acts even if the plaintiffs cannot bring the suit in the appropriate forum. Nevertheless, this provision is justified in the sense that absent such a statement, plaintiffs would voluntarily fail to bring the suit and wait to have the case resumed by the first court.

The discretion of the courts in applying article 22 is also limited by the test which must be verified by the forum seized. Three conditions must be looked at separately: (1) the court must find itself a clearly inappropriate forum, (2) the alternative forum must have jurisdiction to hear the case, and (3) the alternative forum must be clearly more appropriate. A finding that the alternative forum may be "clearly more appropriate" does not necessarily mean that the forum seized is itself "clearly inappropriate." Thus, the mechanism ensures that the case will be tried either in an appropriate forum, although possibly not in the most appropriate forum, or in the least inappropriate forum.

Article 22(2) sets forth a non-exhaustive list of factors that the forum seized may consider in determining whether it should

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215. *Id.* at art. 22(1).
216. *Id.*
217. *See supra* IV(B)(1).
218. Hague Convention on Jurisdiction and Judgments, Interim Text, art. 22(1).
219. *Id.*

suspend its proceedings or not.[220] An exhaustive list would certainly have better satisfied representatives of the civil law tradition in the negotiations inasmuch as it would have limited the wide discretion that judges enjoy in dealing with the appropriateness of the two fora. However, the use in Article 22 of the words "in particular"[221] implies that the list is only given an illustrative value and can therefore be extended.

Improvements could be made to the provision. For instance, the interesting solution of the *Piper Aircraft* decision[222] could be reflected in a paragraph stating that the court cannot consider the possibly less favorable change in the law unless the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all. This could potentially create discrimination on the basis of nationality and thus conflict with article 22(3), which states that courts may not discriminate on the basis of the nationality or habitual residence of the parties in deciding whether to suspend the proceedings, but it would enhance the fairness of the mechanism. An exception to article 22(3) could thus be added to take this change into consideration.

A clarification should also be made in the wording of article 22, which states that the court can suspend the proceedings on application by a "party."[223] By referring to a "party," the text implies that both defendants and plaintiffs can bring a motion under article 22 which can be justly criticized. A motion by a plaintiff, who by definition opted for the forum, would seem clearly abusive and could be used as a tool to complicate the process by slowing it down and causing additional costs for a defendant. A plaintiff could thus force the defendant into a disadvantageous settlement of their dispute, the only motive of the defendant being to avoid additional litigation costs generated by the litigation of the *forum non conveniens* question artificially raised by the plaintiff. Therefore, a reformulation of the article to specify that the motion can only be brought by a defendant would avoid these abuses.

Despite these possible improvements, article 22 of the Interim text is a good mechanism giving the courts a chance to compensate the possible unfairness created by the *lis pendens* clause.

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220. *Id.*
221. *Id.*
222. *Piper Aircraft Co.*, 454 U.S. at 235.
223. *Id.*

VI. CONCLUSION

From two apparently conflicting doctrines was conceived, in the Hague Compromise, an efficient system which combines the need for legal predictability and the necessity to take into consideration the fairness of the process. At the present stage, the Hague negotiations on this issue have been abandoned in favor of a narrower text. Nevertheless, the need for a convention on jurisdiction and enforcement of judgments is not itself affected by the problems encountered in the Hague negotiations. It is inevitable that new proposals will be drafted in the future in order to eventually achieve what eminent international lawyers have endeavored to build for decades: a comprehensive and efficient international regime on jurisdiction and enforcement of judgments. One can thus only encourage its future drafters to take advantage of the tremendous work that was done in the context of the Hague negotiations on the question of declining jurisdiction. Certain minor changes could be made which seem acceptable to both legal traditions and would only benefit the administration of justice. Nevertheless, the compromise reached in the Hague negotiations establishes a good balance between common law and civil law positions on judicial discretion. Both sides have made concessions and the result is a theoretically efficient system. The word "theoretically" is here meant to emphasize the fact that the practicality of the compromise will not be fully ascertained until national courts actually apply it. Courts of common law countries will need to accommodate the reduced discretion resulting from such compromise and, similarly, courts of civil law countries will have to adapt to the new notion of "appropriateness of the forum" and give more consideration to the fairness of the process.

The success of a possible future convention on jurisdiction and judgments in civil and commercial matters, be it the present Hague Proposed Convention or another future convention, will also depend on its binding character and uniform application. The convention will thus need to be better treated than previous international agreements. The U.S. Supreme Court's approach to the Hague Evidence Convention in the *Societé Nationale Industrielle Aerospatiale*[224] case is an example of this problem which grounded an argument that it is possible "to doubt the

224. Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court, 482 U.S. 552 (1987) (holding that the Hague Evidence Convention is merely an optional instrument).

Court's willingness to recognize and abide by the international character of a jurisdiction and enforcement convention."[225] Nevertheless, a successful outcome in negotiating an international instrument on jurisdiction and judgments would still constitute a major improvement and serve the administration of justice by harmonizing conflicting regimes, a goal that deserves every exertion participating countries are willing to use in the drafting process.

225. Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1285 (1998).